ly agree with the Court of Appeal that the findings favourable to the appellant were arrived at "without an adequate scrutiny and consideration of all the evidence before him".

Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error result in serious injustice.

One example will suffice. Their Lordships have already pointed out that the learned judge rejected the appellant's story of the loans. The appellant sought to boost this part of his story which the learned judge found to be untrue, by calling his son as a witness. The judge's own note of the son's evidence shows that the son was born in 1949 and thus was 5 years old in 1954 when the property was acquired. In 1980 the son gave evidence which the learned judge noted as follows:–

"In 1954 at 15 Norris Road I saw money passing between my father and my uncle, the 1st defendant. I subsequently asked my mother about it and she said that the amount of money is $50,000 and it was to be a loan to my uncle."

Even if it be predicated that the second sentence was admissible evidence against the first respondent, which their Lordships take leave to doubt, for such evidence to be given in 1980 by a witness of an event 26 years before which he claimed to have taken place when he was a child of 5, and to have recollected over that long period, stretches even judicial credulity far too far. Their Lordships do not find it surprising that the learned trial judge wholly rejected this part of the appellant's case. But they do feel bound to express surprise, which no doubt the Court of Appeal shared, that having done so the learned judge should have felt that there could be any credibility left in a case one part of which was sought to be supported by incredible evidence of this kind.

As their Lordships have already pointed out, the learned judge seems not to have considered the probabilities. In their Lordships' view, the probability, if the appellant honestly believed he was beneficially entitled to the property, of his sitting by silently and without protest and allowing the development (of which he was found by the learned judge to have been aware) to take place is, to say the least, slight. On the other hand, in their Lordships' view, there is nothing inherently improbable in the respondents' story.

For these reasons their Lordships are satisfied that the order of the Court of Appeal was correct and the appeal must be dismissed. The appellant must pay the respondents' costs of the appeal, those costs to include any extra costs occasioned by the respondents', in their Lordships' view quite reasonably, insisting on the inclusion of certain documents which would have been needed to support possible alternative submissions which in the event their Lordships have not had to consider.

Appeal dismissed.

Solicitors: *Collyer-Bristow; Coward Chance.*

TIONG ING CHIONG v. GIOVANNI VINETTI

[P.C. (Lord Keith of Kinkel, Lord Elwyn-Jones, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Sir Robin Cooke) June 19 & July 25, 1984]

[Privy Council Appeal No. 22 of 1983]

Tort – Negligent driving – Damages – Damages for past loss of earnings – Damages for future loss of earnings – Unsatisfactory nature of evidence as to damages.

Damages – Past and future loss of earnings.

In this case the respondent brought an action against the appellant for damages for negligent driving, arising out of a collision between a motor cycle driven by the respondent and a motor car driven by the appellant, as a result of which the respondent was badly injured. The trial judge gave judgment for the respondent and awarded him total damages of B$1,300,792 with interest. The appellant appealed to the Court of Appeal, which dismissed both the appellant's appeal on liability and the respondent's cross-appeal on damages, but allowed in part the appellant's appeal on damages by reducing substantially the sum awarded for past loss of earnings. The appellant appealed and the respondent cross-appealed from the order of the Court of Appeal to the Privy Council. The appeal was limited to two issues only, first the amount of damages awarded for past loss of earnings, and secondly the award for future loss of earnings, the appellant contending that both sums were too high and the respondent that they were too low.

In regard to the damages for past loss of earnings, the appellant made three main submissions (1) that the rate of

exchange on the basis of which the Court of Appeal converted back the appellant's loss in *lire* to Brunei dollars was erroneous and that fresh evidence which the appellant applied for leave to adduce would show that the correct figure was different; (2) that the evidence in regard to the actual past earnings and the earnings which the respondent would have earned but for the accident was incomplete and unsatisfactory; (3) the evidence showed that the profit made by the respondent in his new business of selling solar energy panels was wholly inadequate and that a higher profit should have been attributed to him in respect of it.

For the respondent two main submissions were made (1) that the rate fixed for conversion from Italian *lire* to Brunei *dollars* should have been a varying rate at various periods and (2) that the profit made by the respondent in his new business was not as high as that found.

In regard to the damages for future loss of earnings, the multiplicand of $72,000 adopted by the trial judge and accepted by the Court of Appeal was attacked by the appellant as being too high. The multiplier of 13 adopted by the trial judge and accepted by the Court of Appeal was attacked by the respondent on the ground that it was too low and by the appellant on the ground that it was too high.

Held: (1) the submissions made by the respondent and by the appellant in regard to the damages for past earnings should be rejected;

(2) despite the contentions advanced on both sides, the figure of $936,000 as damages for future loss of earnings has not been shown to be wrong and should stand;

(3) the question of what is a proper amount to award for damages in this case involved no question or principle of law. There were concurrent findings of fact on this issue by both the trial judge and the Court of Appeal and it is not the practice of the Board, save in exceptional circumstances, to interfere with such findings. There were no such exceptional circumstances in the case.

Cases referred to:

(1) *Powell* v. *Ng Cheng Tee* [1979] 1 M.L.J. xxxix.
(2) *Lim Phuay Siang* v. *Cheong Yuen Lin* [1979] 1 M.L.J. xxxviii.
(3) *McGuinness* v. *Ahmad Zaini bin Tahir* [1980] 2 M.L.J. 304.
(4) *Baird* v. *Roberts* (1977) 2 N.S.W.L.R. 389, 397.
(5) *Allan* v. *Loadsman* (1975) 2 N.S.W.L.R. 789.
(6) *Yammine* v. *Kalwy* (1979) 2 N.S.W.L.R. 151, 155.
(7) *Lee Woon Sun* v. *Wong Kin Keung* (1976) H.K.L.R. 296.
(8) *Taylor* v. *O'Connor* [1971] A.C. 115.
(9) *Mallet* v. *McMonagle* [1970] A.C. 166, 174.

HIGH COURT.

T.C. Chan (*S.P. Wong* with him) for the Plaintiff.

R. Karuppan Chettiar (*Sarjeet Singh* with him) for the Defendant.

Penlington J.: I will deal first with the question of liability. On October 6, 1977 at about 10.10 p.m. the plaintiff was riding his motorcycle along Jalan Bunga Raya, Kuala Belait. It was a cloudy evening and there was evidence it had been raining. The plaintiff had a lady on the motorcycle as a pillion passenger.

As the plaintiff was passing the entrance to the Kuala Belait General Hospital, travelling easterly, his motorcycle come into collision with a car driven by the defendant. The pillion passenger was thrown onto the car, coming to rest according to the defendant's evidence, against the windscreen. She suffered injuries from which she died. The plaintiff said, and I accept, that he become unconscious and did not regain consciousness until he was in hospital.

The plaintiff said he had the headlight of his motorcycle on dipped beam, which was normal when travelling around KB. He could see the road ahead of his motorcycle in that light for about 10/15 metres. He said he saw the defendant's car coming towards him but could not remember seeing any turning lights flashing on it. However, he said he would not disagree if the defendant said he had such lights on, as indeed was his evidence. He could not say how far away from the car he was when it turned in front of him or whether he hit the car or vice versa. He said he was on the left hand side of the road, about 1 metre from the verge and gave his speed at 25/30 mph. He said he regarded that as a normal speed.

The motorcycle was a motorcross type, 250c.c., and was not a high speed machine but was capable of speed of about 90 k.p.h. The plaintiff's evidence as to speed was attacked by Counsel for the defendant who suggested he was going faster than he had said. The defendant relied on the evidence of the damage to the defendant's car (see photographs and report in the agreed bundles).

Mr. Eric Vennell, a claim's assessor, gave evidence as to the damage to both the car and the motorcycle. He said in his opinion the damage was not consistent with high speed and in particular he would have expected much worse damage to the motorcycle if he had been going very fast. He had seen cases in which the damage to the motorcycle was very much worse than in this case.

There is clear evidence that the accident occurred on the plaintiff's side of the road. This

is established by the position of the two vehicles after the accident and the position of the broken glass from the car's left front headlamp, the motorcycle's lamp strangely enough being undamaged. This point of impact was estimated by Mr. Vennell on a plan he prepared to scale following a plan prepared by the police investigating officer and I think it is correct.

The defendant said that on the night in question he was taking a sick friend to hospital, signalled his intention to turn right out of Jalan Bunga Raya into the hospital entrance at about 150ft. away. While he was turning he saw one headlamp approaching about 50 yds. away. Before that he saw no vehicle approaching. He thought it was safe to turn but there was a bang and the accident occurred.

Jalan Bunga Raya, looking east from the scene of the accident, is straight for about 600 yds. I am satisfied that the defendant must have seen the plaintiff much further away than 50 yds, if he was keeping a proper look-out. The plaintiff had the right of way and the defendant was under a duty, being in a car that was turning to its right across the path of an oncoming vehicle, to allow it to pass before turning.

I found the plaintiff to be an impressive and honest witness and I accept his evidence of speed, which was corroborated by the lack of extensive damage to his motorcycle. I am satisfied that he was not speeding, even if that were relevant. I am satisfied the defendant was entirely responsible for the accident. The plaintiff is entitled to judgment in his claim.

QUANTUM OF DAMAGE

Special damages

a) Hospital expenses, damage to the motorcycle, etc. have been agreed at $10,292.

b) Loss of earnings:–
there was an unfortunate lack of documentary evidence on this head which should have been easy to calculate. It is not in dispute that the plaintiff commenced work with his employer, Sub Sea Ltd., in January 1976 as a 4th class diver. He was promoted to 3rd class diver before the accident and said at that time he was earning about $8,000 a month. This included basic salary which was paid in Italy, and various bonuses and extra payments. His income after the accident went from that to about $1,000 which was paid by the Italian Government, until he got medical clearance to work as a shallow-water diver in August 1978. He then worked in Libya for a short period at a salary of $4,000 per month, returning to Brunei in January, 1979; where he was paid $4,000 – $4,500. He returned to Italy in June for medical treatment, came back to Brunei at the same salary but eventually resigned from Sub Sea Ltd. in January 1980.

It is the plaintiff's claim that he would have been promoted to 2nd class diver on the January 1, 1978 when his salary would have increased to $9,500 per month. That evidence is supported by Mr. Vittorio Majoni, his supervisor here at that time, and I accept that evidence. I found Mr. Majoni to a most impressive and honest witness.

The plaintiff said that after he resigned from the Company he was not employed until August 1980 when he started to work on his own account selling solar panels. He invested some $30,000 in the business, and his father did the same. He said that the profit from the business varies according to the seasons but the turnover is about $4,000 a month. He has to spend quite a lot on advertising and there are other overheads. I will, however, assume that he made a profit of $4,000 per month during that period. I will also assume that from January to August 1980 he was receiving the $1,000 a month Government allowance.

I would make an award for loss of earnings as follows:

6/10/77 to 31/12/77 at $7,000 pm	$19,000
1/1/78 to 1/1/79 at $8,500 pm	$100,000
1/1/79 to 1/1/80 at $5,000 pm	$60,000
1/1/80 to 1/8/80 at $8,500 pm	$55,000
1/1/80 to today at $5,500 pm ($9,500 – $4,000)	$93,000
	$327,000

General Damages

a) Pain, suffering and loss of amenities. The up-to-date medical evidence was contained in a very comprehensive report from Dr.W.N. Cheng, a highly qualified orthopaedic surgeon from Singapore.

He said the plaintiff's injuries were:
Compound fracture of his right femur
Compound fracture of his right tibial plateau with disruption of the patellar tendon.
Fracture of the lateral malleolus of his left ankle.

There were scars on his leg, right arm and two small ones on his face. His right leg is 1 cm. shorter than his left but that was not significant. There was some restriction in movement of the right hip and left ankle but good recovery had been made from all injuries except the right knee. Osteoarthritis is already present and there are loose particles present. There is pain and stiffness in the joint which will probably increase and movement become less. If the pain gets too bad the knee may have to be fused and later on an artificial joint inserted.

I have been referred to several cases where various levels of damages for such injuries have been awarded. In *Powell* v. *Ng Cheng Tee*[1], $17,000 was awarded to a man of 23 where the injury was similar. In *Lim Phuay Siang* v. *Cheong Yuen Lin*[2], $25,000 was awarded for what seems to be a similar case. In *McGuinness* v. *Ahmad Zaini bin Tahir*,[3] $50,000 was awarded for the total loss of a leg above the knee.

Taking those authorities into account and allowing for the affects of inflation I award the sum of $27,500 for pain, suffering and loss of amenities.

b) Loss of future earnings:–

It is quite clear from the medical evidence that the plaintiff will never be able to dive professionally again. He has some technical training but I accept that it is only enough to work as an engineering assistant and such positions are not easy to get and are not well paid. He could possibly have got a job as a storeman with the Sub Sea Ltd, at about $2,000. He has in fact become self-employed in a highly competitive field and his future is by no means certain. However, I was impressed with him and, certainly Mr Majoni speaks well of him as a serious, quiet man who would accept responsibility. I think his business should improve but it is of course only a hope. I will assume however that his average income in future will be about $6,000 per month.

Such estimates must, as the learned Chief Justice said in *McGuinness*, "be nothing more than a rough guess," but I do take into account that as a result of this accident, unfortunate though it was, the plaintiff will have capital to invest in his business which he said he needed to build it up.

I accept the evidence of Mr. Majoni that the plaintiff would in all probability become a 1st class diver and then a superintendent. His evidence was that as such his income would be $12,000-$14,000 a month. That would vary depending on where he was sent. He could remain as a superintendent until retiring at the age of 60. It was Mr. Majoni's evidence that the plaintiff was well thought of by Sub Sea Ltd. He said that the Company employed a very large number of divers, most of whom were free-lance. It only offered permanent employment to those few it considered as above average and the plaintiff was one of those.

Mr. Colin Wilson, of another diving company, Ocean Engineering Co. Ltd., now working in Brunei as project manager, said that a diver of 5 years' experience could expect $8,000 net per month, plus free housing, the usual expatriate benefits, and a bonus of about 20% (that would be about $1,600 for such a diver). That, plus the free housing which I would estimate at 10% of salary as was done in the case of *McGuinness*, seems to equate with Mr. Majoni's estimate of $12,000 per month.

Mr. Majoni gave evidence, as did Mr. Wilson, that divers can earn very high bonuses indeed – about US$200 – US$300 per day if they are engaged in saturation diving, that is they live and work constantly under pressure. Mr Majoni said it is possible to work under constant pressure for up to 30 days without a break but a rest period of half that time is then required. The bonus for such a period would be about US$16,000. There was no specific claim for such a bonus and while it seems that saturation diving is becoming more common I do not know if the plaintiff would have done any – he did not refer to it in his evidence. I therefore make no allowance for it.

It was urged by the defence that I should not use a single multiplier on the basis that it would produce far too large a sum and that

today's high interest rates meant that such a sum was not justified. I do not see any authorities for that and I think I should follow the way in which the learned Chief Justice calculated damages for loss of future earnings in the case of *McGuinness.*

I therefore take loss of earnings at $12,000 per month, less $6,000 i.e. $72,000 per year. The plaintiff is now 27 and would normally have retired at 60. He was, however, engaged in a hazardous occupation and that is a factor which must be considered. The Chief Justice in *McGuinness,* applied a multiplier of 12 for a man of 34 who was a driller, also a hazardous occupation, who would retire at 55. I think I should apply a multiplier of 13 here. That gives a figure for loss of future earnings of $72,000 x 13 = $936,000.

The awards are therefore:

Special damages/hospital expenses	$10,292
Loss of earnings	$327,000
General damages/Pain, suffering and loss of amenities	$27,500
Loss of future earnings	$936,000
	$1,300,792

That is a very large sum of money and the defence argued that, taking into account current interest rates, such sums are unrealistic.

First of all it seems to me that one should not depart from accepted principles just because the resultant figure is very large.

Secondly, the plaintiff was a well qualified member of a very highly paid profession, whose future in his company was very good. Even if it was not I accept Mr. Wilson's evidence that experienced divers are in much demand as the search for oil goes on, no doubt going deeper and into areas where good divers are essential.

In one moment that career has been destroyed and his future is now very uncertain indeed, he may well finish in a job which pays much less than what I have estimated if his business does not prosper.

Thirdly interest rates are high, though coming down, but capital is also depreciating at a rapid rate and that is not likely to be halted. I think that current interest rates, while appearing to be very attractive, are deceptive because of the corresponding high rate of inflation. If funds are invested in a way which keeps capital more intact, such as property, the income return is very much less. Taking account of inflation I am of the view that the courts should still base awards on the traditional rates of interest of 5-6%.

There are two other matters which I should deal with. One is that evidence was given that a retirement provident scheme was operated by Sub Sea Ltd. under which a lump sum of one month's salary per year of employment was payable. The evidence on this was not comprehensive and no details were given as to if it was payable before the age of 60 or on what conditions, or what contributions were made by the employee. It was not pleaded. In view of the large amount of capital the plaintiff will now have I make no award in respect of the loss of retirement benefit, though this would have been a large sum.

There was also some argument as to the plaintiff's liability to tax. It is not at all clear if he would be liable to Italian tax, but if working elsewhere he would presumably pay tax in that country.

It seems, however, that divers are an international breed of men and if the tax liabilities in any country are high, a larger salary would have to be paid to compensate. Mr. Majoni said a superintendent would get $12,000 – $14,000. We do not know where the plaintiff would have gone if he had continued with Sub Sea Ltd. I have therefore not deducted anything for tax payable on future earnings.

The plaintiff is entitled to his costs on the claim and he is also entitled to his costs on the counterclaim, which is dismissed.

There will be interest at 3% on the amount for loss of earnings from date payment would have become due and at 6% on hospital expenses, etc, and pain, suffering and loss of amenities from the date of service of the writ.

There will be a stay of execution until determination of the appeal on condition that the appeal is lodged within one month and the sum of $300,000 is paid to the plaintiff's solicitors within 14 days.

Certificate for 2 counsel.

COURT OF APPEAL.

(*Sir Geoffrey Briggs P.*, and *Sir Alan Huggins J.A.* and *Bewley J.* sitting as Commissioners).

H.E. Cashin (*R. Karuppan Chettiar* with him) for the appellant.

T.C. Chan (*S.P. Wong* with him) for the respondent.

Sir Alan Huggins J.A. (judgment of the Court, read by Dato Mohamed Ali bin Salleh, Chief Registrar): There was an accident outside the Kuala Belait General Hospital at about 10.10 p.m. on October 6, 1977. The Respondent Plaintiff was riding a motor-cycle towards Kuala Belait when a motor-car, driven by the Appellant Defendant, crossed in front of him in the course of a turn from the opposite lane into the hospital entrance. The Plaintiff's motor-cycle struck the car and the Plaintiff was injured.

Liability

The trial judge found the Defendant solely to blame for the accident and the Defendant appeals, contending that the Plaintiff contributed to his own loss at least to some extent.

In my view the judge was entitled to reach the conclusion that he did. Whether or not the Plaintiff was negligent in failing to see the Defendant's car sooner (and I am not sure whether his evidence should be read as meaning that he was entirely unaware of the presence of the Defendant's car until it turned across his path), that negligence in no way contributed to his damage. I accept the judge's finding that the Defendant's car was displaying not only the regulation driving lights but also a trafficator light indicating an intention to turn right. The fact remains that until the car started its fatal turn the Plaintiff was justified in assuming that it represented no danger to him. By that time it was too late to take effective avoiding action. Just as the use of a trafficator gives a driver no right to carry out the manoeuvre which he indicates, so it does not impose on other road users any obligation to suppose that the manoeuvre will be performed until it is safe. Only when the danger becomes apparent to another road user does that road user have a duty to take reasonable precautions to protect himself from it.

Damages

The judge awarded $10,292.00 special damages, $27,500.00 for pain, suffering and loss of amenities, $327,000.00 for loss of earnings to the date of trial and $936,000.00 for loss of future earnings, making a grand total of $1,300,792.00. The Defendant appeals against the award for pain, suffering and loss of amenities and against the awards for past and future earnings. The Plaintiff cross-appeals against the award for past and future earnings.

Pain, Suffering and Loss of Amenities

The judge was referred to several cases where comparable injuries were suffered and based himself on these cases, after taking the effect of inflation into account. The Defendant thinks the figure of $27,500.00 too high but does not challenge it. The Plaintiff submits that it is too low and ought to be increased to $35,000.00. There is a body of opinion that the general level of awards under this head has, in the past, been too low and there is much to be said for it. However, a general level has been established and I do not think we should disregard it. In my view the award in the present case is not substantially out of line with past awards and I would not interfere with it.

Loss of Earnings

In relation to the earnings one must first inquire what the Plaintiff was earning at the date of the accident, and at once we run into difficulty because the whole case was tried on the false basis that the Plaintiff was being paid in Brunei dollars, whereas the fact is that his basic salary and deep sea diving bonus were paid in lire in Italy. As I understand it, he was then a third class diver earning.

Basic month salary (equivalent to B$3,500.00 at B$1 = L.280)	L. 980,000
Deep or off-shore sea allowance (equivalent to B$1,500.00)	L. 420,000
	L. 1,400,000
Local allowance (a variable which the judge took at the higher end of the bracket)	B$3,000.00

As he had been abroad for more than 12 months, no tax was payable in Italy.

Another difficulty which has bedevilled us, as it must the trial judge, is the unsatisfactory nature of the rest of the evidence as to damages. For example, it is not entirely clear whether the Plaintiff's company paid him anything when he became unable to work by reason of an accident unconnected with his employment. The judge obviously thought that it did not and that the "$1,000.00" allowance which was paid for a time by the Italian Government was in the nature of an unemployment allowance. (That figure should, of course, be expressed in lire, say L.280,000.00.)

The question arises whether, and if so to what extent, the Plaintiff's failure to call satisfactory evidence as to his actual past-accident earnings has prejudiced his claim. Where lies the burden of proof? The basic rule is that a plaintiff must prove his loss. Where a defendant contends that that loss should have been mitigated, the onus of proving the possible mitigation is on the defendant. A loss of earning capacity is generally, and was here, sought to be established by showing what the plaintiff would have earned if he had not been injured and by deducting therefrom what he will be able to earn in his injured state. By "mitigation" in this type of case is meant, for example, the undergoing of medical treatment which would reduce the loss of earning capacity or the acceptance of available employment in another area. The proper approach to the assessment of damages for loss of earning capacity has been the subject of several decisions in the courts of New South Wales in the past 10 years and a useful statement of general principle is to be found in the judgment of Mr. Justice Mohoney in *Baird* v. *Roberts*:[4]

"The way in which the loss is to be taken into account must, as I have said, be determined according to the circumstances of the case before the court. Although that for which compensation is given may be the loss of economic capacity, that loss often will be best quantified by considering what is the relevant result from it, viz., the difference between the remuneration which could have been obtained by employment of the plaintiff's pre-injury capacity and that which can be obtained by employment of his reduced capacity after the injury: cf. *Ruby* v. *Marsh* (1975) 132 C.L.R. 642, at p.663, per Stephen J. This is the approach frequently adopted and, in my opinion, rightly so. In the kind of case where the compensation sought is for a reduction, and not for a complete destruction, of the economic capacity, such an approach will afford, *prima facie*, the most direct assistance in quantifying the compensation. This does not mean that it is the only approach which can be made. There, no doubt will be circumstances in which a comparison between such pre- and post-accident remuneration possibilities cannot be made. In such cases, the court has the more difficult task of taking into account or fixing upon a figure for a reduction in capacity generally.

However, in many cases, it will be to the advantage of the plaintiff and the defendant to have the compensation assessed upon the basis of a comparison of such pre- and post-accident possible earnings. But, if the court is to be asked to adopt this approach and the parties are to have from such an approach the benefits which they seek to obtain from it, then, in my opinion, appropriate evidence must be adduced to support it."

In the present case it was for the Plaintiff to prove his loss and, since he sought to compare the pre- and post-accident possible earnings, to show what he was now able to earn in his injured state (see *Allan* v. *Loadsman*[5]): there was no question of mitigation. The fact that the evidence of the prospective earnings of his business was far from satisfactory does not mean that the judge was unjustified in doing his best to arrive at a just conclusion. Even though the onus was on the Plaintiff to prove his loss, it was open to the Defendant to adduce evidence to refute such evidence as the Plaintiff did provide. Indeed I would accept the view of Mr. Justice Reynolds in *Yammine* v. *Kalwy*[6] that

"... in seeking to quantify his damages, a plaintiff could be well advised to offer such evidence in many cases; and likewise a defendant, in seeking to cut down the damage, might similarly be well advised to tender such evidence; neither, in the absence of such evidence, could complain, to the same effect, at any quantification arrived at. This, however, is far from asserting that in the absence of such evidence only nominal damages is appropriate.

In *Kealley* v. *Jones* [1979] 1 N.S.W.L.R. 723, at p. 732 et seq. the President dealt with this matter in terms with which I express respectful agreement. In my opinion, where a plaintiff has suffered a significantly disabling injury which obviously affects the range and nature of the work, he can, therefore, perform, a tribunal of fact can, without specific evidence as to what other persons with that kind of disability can earn, make a judgment and assessment, on a percentage basis or otherwise, of the value of the lost capacity. *Allan* v. *Loadsman* should not be understood as deciding otherwise."

In truth Mr. Cashin did not contend that the Plaintiff had failed to prove any loss but merely that, on the whole of the evidence, it was wrong to conclude that the loss was as great as the judge found it to be.

On the question whether the Plaintiff's company paid him anything when he became unable to work, I incline to the view that there was just enough evidence for the judge to find as he did. The Plaintiff was unable to work from the date

of the accident to the end of 1977 and, therefore, during that period he received only L.785,806.44 in unemployment allowance.

In 1978 he was unable to work until August and for the first seven months he received a total of L.1,960,000.00 from the Italian Government. He then obtained a licence to work as a shallow water diver and went to work in Libya. He was there for 20 days and was paid "$4,000.00 a month". Presumably that was expressed, but not paid, in Brunei dollars and meant the rate at which he was paid. There was no evidence as to where it was paid and I shall leave the amount in Brunei dollars. The judge did not explain how he arrived at his figure of the loss for 1978, but Mr. Chan suggests that he assumed an income limited to the unemployment allowance throughout the year. If that be so, it cannot be right: the Plaintiff worked in August and we must not assume that he was unemployed upon his return to Italy. On the contrary, I would assume that he continued to be paid the equivalent of $4,000.00 a month, say L.1,120,000.00 making a total of L.4,480,000.00 for the four months.

Although the judge assumed a loss of earnings of $5,000.00 a month from January 1, 1979 to "January 1, 1980", I think we need to consider this period in detail. In January the Plaintiff returned to Brunei and was re-employed by his old company at a salary of "$4,000 – $4,500 per month". I say he was "re-employed" although there was no evidence that he was ever discharged by the company and there is the evidence of pay sheets suggesting that he was never discharged. Those pay sheets are in Italian and no translations were provided. The judge did not rely upon them and I do not think we can do so, save as evidence that the Plaintiff was still employed. Although his evidence was contradictory, his basic salary appears now to have been paid locally with "two other payments in Italy", say B$3,500.00 and L.280,000.00 a month. This continued until June, when he returned to Italy for medical treatment. That makes B$17,500.00 and L.1,400,000.00 for the first five months and, since he did not say what form the treatment took or how long it took, one cannot assume he was not working during the treatment and I shall assume, as did the judge, the same rate of earning as in January to May. The Plaintiff returned to Brunei for one month, during which he would have earned B$3,500.00 and L.280,000.00, and then returned to Italy, whereupon he asked to be sent to Libya. He went to Libya for two months at a salary of "about $4,000.00" – as before. That comes to the equivalent of B$8,000.00. After that – it would be October 1979 – he returned to Italy. Until he started his own business in "August/September 1980" his income is unclear. There are pay sheets up to January 1980, when, he says, he resigned. He did not say why he resigned or what he earned prior to his starting in business. The judge assumed that he was unemployed from October 1979 to the end of July 1980. We have seen that he was still employed until the end of January 1980, but I do not think we can quarrel with the finding that he was unemployed thereafter.

The evidence as to the earnings of his business is woefully inadequate, but the Plaintiff said that by the date of the trial he had a turnover equivalent to "about B$4,000.00". This varied according to the season. What we are concerned with is not turnover but profit, and there is no evidence at all as to that. All the Plaintiff said was that a bit less than $3,000.00 went into buying new stock and a bit more than $1,000.00 'is expenses'. What is 'new stock?' I take it that he meant increased stock for the purpose of building up his business and that the replacement of old stock which had been used in making the '$4,000.00' was covered by 'expenses.' Nevertheless the evidence is so unsatisfactory that I think the judge was entitled, as he appears to have done, to treat the entire '$4,000.00' as profit. It should, however, be expressed in lire without the benefit of the increasingly favourable exchange rate i.e. L.1,120,000.00. Accordingly, in the period August 1980 to 6th December 1981 the total would come to L.18,136,774.09.

The actual pre-trial income can be summarized as follows:

Period	*L*	*B$*
1.10.77 to 31.12.77	785,806.44	–
1. 8.78 to 31. 7.78	1,960,000.00	–
1. 8.78 to 31. 8.78	–	4,000.00
1. 9.78 to 31.12.78	4,480,000.00	–
1. 1.79 to 30. 6.79	1,680,000.00	21,000.00
1. 7.79 to 31. 7.79	280,000.00	3,500.00
1. 8.79 to 30. 9.79	–	8,000.00
1.10.79 to 31. 1.80	–	40,000.00
1. 2.80 to 31. 7.80	1,680,000.00	–
1. 8.80 to 6.12.80	18,136,774.09	–
Total	29,002,580.53	76,500.00

Pre-trial Earnings if not Injured

The pre-trial earnings, if the Plaintiff had not been injured, would have been as follows. From the day following the accident until December 31, 1977 he would have been paid at the pre-accident rate. In January 1978 he would probably have been promoted to 2nd class diver and would have been paid L.1,400,000.00 as basic salary plus L.420,000.00 deep sea allowance and a local allowance of B$3,000.00. That would have been continued until the end of 1979, when the company ceased operations in Brunei. In 1980 he would still have been a 2nd class diver but it is not known where he would have worked. Presumably he would have continued to draw his basic salary and deep sea allowance, both payable in Italy. The judge found that in 1981 he would have been likely to be promoted to 1st class diver and his basic salary would then have been L.1,820,000.00 plus the deep sea allowance of L.420,000.00. The annual totals would thus be:

	L	*B$*
1977	3,929,032.20	8,419.35
1978	21,840,000.00	72,000.00
1979	21,840,000.00	72,000.00
1980	21,840,000.00	–
1981 (to 6 Dec)	25,273,548.19	–
	94,722,580.39	152,419.35

As tax was payable in Italy for only one year after the Plaintiff went abroad and no tax was payable in Brunei, I think the judge was justified in ignoring the incidence of taxation.

Loss of Earnings to date of Trial

We are now in a position to calculate the loss to the date of trial and it comes to L.65,719,999.86 and B$75,919.35. At the rate of exchange ruling at the date of trial, namely B$1 = L.520, that amounts to B$202,303.96, which is $124,696.04 less than the judge awarded.

Future Earnings if not Injured

We then come to the loss of future earnings. Here we must estimate what he was likely to have earned had he not been injured and what he was likely to earn in his injured state. Clearly the Plaintiff has not been wholly incapacitated and, to arrive at his actual loss, some deduction must be made from the amount he would have earned had he not been injured. The judge thought the loss could properly be arrived at by deducting the prospective profits of the Plaintiff's business and that it was fair to assess those profits at $6,000.00 a month. The attack on the award is, in effect, in two stages: first it is said that the finding that the prospective profits can properly be assessed at $6,000.00 a month is not supported by sufficiently cogent evidence: then it is said that, however one calculates the loss of earning capacity, the final figure of $936,000.00 is manifestly too high.

The judge accepted the evidence that the Plaintiff was a proficient diver who would have done particularly well. He therefore made his entire calculation on the basic salary of a Superintendent Diver which was said to be equivalent to B$12,000.00 to B$14,000.00. He took the lower figure. Mr. Chan objects that, although it was reasonable to base the calculation on a Superintendent Diver's salary, it was unfair to take the lower figure in view of the Plaintiff's record, and he suggests that one ought to take a mean figure of B$13,000.00. The judge gave no reason for adopting the lower figure, but I do not see that it is open to us to say that he was wrong. It gives an annual figure of B$144,000.00.

Future Earnings in Injured State

On the other side of the balance sheet the judge assumed that the Plaintiff's business would at all material times make a profit of the equivalent of B$6,000.00 a month. The evidence was, as we have seen, that it had a turnover equivalent to "about B$4,000.00 p.m.", and that it varied according to the season. In the Plaintiff's evidence there then appears the note: "Now in winter', I am not sure what that means, but presumably such a business is less profitable in the winter and the suggestion was that in the summer the profit would be higher. How much would it be? The Plaintiff emphasized that his was a new product and he said that he hoped to make enough to live on. This suggests that he was not yet earning enough to live on. In any event he was ploughing all the profit back into the business with the object of building it up. The judge, having taken the entire $4,000.00 as 'profit' for the purposes of pre-trial earnings, then estimated the profit throughout the assumed working life as $6,000.00. There was no other evidence to support such a finding and the Plaintiff submits that the finding was not justified. I do not see what else the judge could have

done than to take a figure out of the air. To assume that the Plaintiff would make no profit at all would mean that he would be entitled to sit back and live at the Defendant's expense. On the other hand Mr. Cashin points out that the future profits might well exceed the amount of the Plaintiff's estimated future earnings as a diver: in that event there might be no loss at all and, having regard to the fact that the Plaintiff had a working life of some 28 years ahead of him and to the fact that he was the type of man who was likely to do well at any job he took up, it was too cautious an estimate that a business which had made a monthly profit of $3,000 – $4,000 after only a few months of trading would earn only an average of $6,000 throughout the whole of the material period. Mr. Cashin emphasized that the nature of the Plaintiff's injuries might have made him unfit for deep sea diving but they would not affect his managerial capabilities. Moreover, he objected that the judge had accepted the Plaintiff's statement of his earnings in Brunei dollars, when they should have been expressed in lire and then converted at the current rate of exchange, bearing in mind the large drop in the value of the lire against the Brunei currency.

I have every sympathy with the trial judge: he was trying to do justice to both sides on very slender evidence. He was satisfied that the Plaintiff would suffer some loss, but equally it was obvious that the business would make some profit or the Plaintiff would discontinue it and do something else. It was reasonable to assume that the small initial profit would increase and I think the judge was certainly entitled to take as a minimum the figure he did. I have no doubt that if I had been trying the case at first instance I would have assessed the probable future profit at a higher figure, even though the future is inevitably fraught with uncertainty. Nevertheless, after much deliberation, I have come to the conclusion that I cannot say the judge was not entitled to find as he did.

I have not overlooked two further contentions. The first was that the judge ought to have had regard to the pension which it was said the Plaintiff would have earned if he had remained with the company which was employing him at the time of the accident. Apart from the fact that it appears to have been a non-contributory pension, no details of the scheme can be deduced from the evidence. The trial judge gave three reasons for disregarding the pension:

(i) that the evidence on the subject 'was not comprehensive and no details were given as to if it was payable before the age of 60 or on what condition';

(ii) 'it was not pleaded' and

(iii) 'the large amount of capital the Plaintiff will now have.'

In my view the last two reasons cannot be supported. Any loss of pension would be part of the future loss and there was no need to plead it specifically. The fact that an award will be very large without taking into consideration a factor which would normally be considered does not justify the judge in disregarding that factor: that is tantamount to reducing a proper award on the sole ground that it is very large, which cannot be right. However, the first reason given for disregarding the pension is ample ground for upholding the decision of the judge.

Secondly, I have not overlooked the judge's decision that no discount ought to be made for tax. Mr. Cashin submits that there should be a discount of not less than 30%. Although there was evidence that salaries were taxed in Italy, there was none that business profits were taxed or to what extent they were taxed. Perhaps one is entitled to say, on a balance of probabilities, that if salaries are taxed business profits will also be taxed, but the amount is a matter of pure conjecture. Moreover, if prospective profits should be discounted for tax, so should the prospective salary as a diver. I think both sides were at fault in leaving the judge entirely without assistance on the point and it seems to me that he cannot be criticised for having decided to ignore tax.

Loss of Future Earning Capacity

The resulting annual loss of future earnings, which is here the measure of the loss of earning capacity, is B$144,000.00 less $72,000.00, i.e. $72,000.00.

The judge took a multiplier of 13. Mr. Cashin submits that this was generous but does not attack it as such. Mr. Chan submits that it is too low and ought to be increased. I have said before that the use of multipliers in the way in which they have come to be used is arbitrary, often misleading and thoroughly unsatisfactory. However, it is too late to say that it is wrong.

In the present case there has been much discussion of the evidence relating to the hazards of a diver's occupation. The Plaintiff submits that the judge attached too much weight to this factor in

view of the fact that he would rarely have dived after being appointed a supervisor and would never have dived after becoming a Superintendent. However, I am not persuaded that the judge failed to appreciate that the greatest danger would continue for only a limited period we cannot say for certain what discount he did make for it, but my calculation at the end of this judgment may show that he assumed a working life of 25 to 26 years and therefore discounted by about 24%. It was common ground that the Plaintiff could have worked for another 33 years (until the age of 60 years). In *Lee Woon Sun* v. *Wong Kin Keung*[7] I suggested that as a general rule a discount of not more than 10% would be appropriate for the contingencies of life. This is not a normal case and I think a discount of 15% would have been appropriate in view of the hazards under which the Plaintiff would have been working. I would therefore have calculated the damages on the basis of a working life of 28 years.

Whichever way one chooses to make the calculation I think we are bound by authority to say that, after making good the Plaintiff's loss year by year, the capital (with interest thereon) must be exhausted at the end of what would have been the Plaintiff's working life. Thus in *Taylor* v. *O'Connor*[8], the court took a multiplier of 12, but the remaining working life of the Plaintiff was 15 to 18 years and at p.143G Lord Pearson said the fund must be exhausted over 15 to 18 years. The reason behind this can be seen from the words of Lord Diplock in *Mallet* v. *McMonagle*[9].

"My Lords, the purpose of an award of damages under the Fatal Accidents Acts is to provide the widow and other dependants of the deceased with a capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortious act of the defendant ...".

The Defendant contends that it is here that the judge went wrong and that he failed to make proper allowance for the fact of a lump sum payment. At some stage the question had to be asked: What sum would need to be invested to produce $72,000.00 a year during the rest of the Plaintiff's working life?

For this calculation it was necessary to decide what rate of interest should be allowed. The judge said that in his view

"The court should still base awards on the traditional rates of interest of 5 – 6%".

Mr. Cashin has submitted that 10% is now the very lowest interest payable on deposits in Europe and that it is unrealistic to assume that the high rates of interest which have now persisted for decades by reason of the continuing inflation will come to an end. Whilst I see the force in this argument (which was advanced in *Mallett* v. *McMonagle* and dealt with at length by Lord Diplock at p.175E) I think it must be remembered that we are not here concerned with a future of a few years but with a working life of about 28 years and I think it is too early to abandon the more modest rate which have been applied until now. I would not disagree with the figure of 6% which was obviously adopted by the judge.

Mr. Cashin then argued that, whatever the multiplier one takes, the fund must be exhausted at the end of that number of years. As Mr. Chan points out, where the generally adopted method of assessment is employed, that argument confuses the multiplier with the length of the working life and he cites *Munkman* on Damages (3rd Edition) 46. If my mathematics are correct, the sum of $936,000.00 awarded by the judge would be exhausted in the last month of the 25th year. As I would have continued the payments until the 28th year, this supports the view that the judge's award was slightly on the low side on his assessment of the probable future profits of the Plaintiff's business, possibly because he made a greater discount for the contingencies of life. Whatever the reason, the award was not so low that I am disposed to increase it. Equally I am not satisfied that the award is so high that it is out of proportion with the loss sustained.

I would therefore allow the appeal to the extent only that I would substitute '$202,303.96' in paragraph (2) of the Judgment with consequential amendments as to interest. I think the Defendant should have (a) 25% of the costs of the appeal and (b) the costs of the cross-appeal.

PRIVY COUNCIL APPEAL FROM BRUNEI.

Nigel Murray (*R. Karuppan Chettiar* and *John Donnelly* with him) for the appellant.

Stuart N. McKinnon Q.C. (*Chan Thuan Chai* with him) for the respondent.

Cur. Adv. Vult.

Lord Brandon of Oakbrook (delivering Judgment of the Board): On October 6, 1977 a collis-

ion took place in a road named Jalan Bunga Raya, Kuala Belait, in the State of Brunei, between a motor-cycle driven by Giovanni Vinetti and a motor car driven by Tiong Ing Chiong, as a result of which the former was badly injured.

On August 27, 1980 Giovanni Vinetti (hereinafter called "the plaintiff") brought an action against Tiong Ing Chiong (hereinafter called "the defendant") in the High Court of the State of Brunei, in which he claimed damages for negligent driving. The action was tried on December 7, 1981 by Penlington J., before whom both liability and damages were in issue, save for a small part of the plaintiff's special damages relating to matters other than past loss of earnings. On December 9, 1981 Penlington J. delivered a judgment in which he found for the plaintiff on liability and awarded him total damages of B$1,300,792 with interest.

The defendant appealed against the order giving effect to that judgment to the Court of Appeal of the State of Brunei on both liability and damages and the plaintiff cross-appealed on damages. By an order of December 18, 1982 the Court of Appeal (Sir Geoffrey Briggs P., Sir Alan Huggins and Bewley J. sitting as Commissioners) dismissed both the defendant's appeal on liability and the plaintiff's cross-appeal on damages, but allowed in part the defendant's appeal on damages by reducing substantially the sum awarded for past loss of earnings.

The defendant appealed and the plaintiff cross-appealed from the order of the Court of Appeal to this Board, as the amount involved in the action entitled them to do. Both appeal and cross-appeal were, however, limited to two issues only, first the amount of damages awarded for past loss of earnings, and secondly, that awarded for future loss of earnings, the defendant contending that both sums were too high and the plaintiff that they were too low.

Most of the difficulties with regard to the amount of damages which have arisen in this case have done so by reason of the want of care, thoroughness and foresight with which the parties' legal advisers first prepared for, and later conducted, the trial at first instance.

In the statement of claim it was pleaded that the plaintiff had suffered loss of earnings totalling B$244,650.00 and continuing. It was further pleaded that the plaintiff would also at the trial claim damages for loss of future earnings.

Some particulars of the claim for past loss of earnings were given but they were wholly inadequate and in part misleading, in that they implied that in his employment, which was that of a deep sea-diver, he was paid in Brunei dollars, whereas in fact, as an Italian working for an Italian company, he was paid largely in Italian lire. The pleading further implied that, in his new business as a seller of solar energy panels, his profits were likewise made in Brunei dollars, although, since he had returned to Italy in order to engage in this new business, it should have been obvious that this could not be so. No particulars of the plaintiff's claim for future loss of earnings were given at all.

The question of the currency in which the plaintiff was paid or made profits before the trial, and the currency in which he would make profits in the future, was one of great potential importance, because the rate of exchange between the Brunei dollar and the Italian lire was at all material times changing rapidly in favour of the Brunei dollar.

The statement of claim, being in this form, clearly cried out for a request, and if necessary an order, for extensive further and better particulars of the claims for past and future loss of earnings. The advocates for the defendant, however, failed to ask for any such particulars. The claims also clearly cried out for a request, and if necessary an order, for full discovery of all the relevant documents in the possession or power of the plaintiff. The advocates for the defendant, however, failed to make a request, or seek an order, for such discovery.

The only effort made by the advocates for the defendant to obtain documents from the plaintiff was a Notice to Produce dated November 26, 1981, asking for production at the trial of all relevant documents, including in particular (a) all records in writing showing past earnings and (b) all previous and present income tax returns filed and receipts for income tax paid in Italy or elsewhere. No consideration appears to have been given to the likelihood that many of the relevant documents would be written in Italian, so that, if they were to be put in evidence or otherwise used at the trial, translations into English would be required. In any case a Notice to Produce at the trial was no substitute for pre-trial discovery.

At the trial before Penlington J. three witnesses gave oral evidence for the plaintiff with regard to his past earnings and what his future earnings would probably have been but for his injuries. These were the plaintiff himself; Vittorio Majoni, the Operations Manager of the company by which the plaintiff had been employed; and Colin Wilson, a Project Manager employed by another company active in the off-shore oil industry. The plaintiff further gave evidence about the profits of his business of selling solar energy panels.

During his cross-examination the plaintiff produced for the first time a bundle of statements relating to his past earnings as a diver, which was put in evidence as exhibit P. 4. These statements were written in Italian and contained somewhat complex figures, so that translation into English and a close study of such figures would have been necessary to enable them to be properly understood. The advocate for the defendant might reasonably have asked for an adjournment for these purposes. He chose, however, not to do so, and put no questions to the plaintiff about the statements. In particular he never put to the plaintiff that, by reason of the changing rate of exchange between the Brunei dollar and the Italian lire, or for any other reason, there were any inconsistencies between his evidence-in-chief in which he had referred to his earnings in terms of Brunei dollars only, and the figures in Italian lire shown in the statements produced. Penlington J. said in his judgment that both the plaintiff and Vittorio Majoni were good witnesses on whose evidence he could rely. Later, dealing with the question of loss of earnings he said:–

"... there was an unfortunate lack of documentary evidence on this head which should have been easy to calculate."

As will be apparent from what has already been said, their Lordships can only regard this observation as a charitable understatement.

Relying wholly or mainly on the evidence of the plaintiff and Vittorio Majoni, Penlington J. made the following findings of fact with regard to the plaintiff's past earnings:–

(1) That at the time of the accident the plaintiff was employed by an Italian company called Sub Sea as a third class diver earning about B$8,000 a month, which included a basic salary paid in Italy and various bonuses and extra payments.

(2) That, following the accident, the plaintiff's income was reduced to about B$1,000 a month paid by the Italian Government.

(3) That this continued till August 1978, when he got medical clearance to act as a shallow-water diver: he then worked in Libya for a short period at a salary of B$4,000 a month.

(4) That in January 1979 he returned to Brunei, where he was paid B$4,000 to B$4,500 a month.

(5) That in June 1979 he went back to Italy for further medical treatment.

(6) That he afterwards returned to Brunei, where he again earned B$4,000 to B$4,500 a month.

(7) That he resigned from his work as a diver for Sub Sea in January 1980.

(8) That, but for his injuries in the accident, he would have been promoted to second class diver on January 1, 1978 at an increased salary of B$9,500 a month.

(9) That, after giving up diving, he was unemployed from January until August 1980, during which period he again received B$1,000 a month from the Italian Government.

(10) That in August 1980 he began work on his own account selling solar energy panels. He invested B$30,000 in that business, and his father did the same. With regard to the plaintiff's earnings in that business Penlington J. said:–

"He (the plaintiff) said that the profit from the business varies according to the seasons but the turnover is about B$4,000 a month. He has to spend quite a lot on advertising and there are other overheads. I will, however, assume that he made a profit of B$4,000 per month during that period."

Their Lordships would pause to observe that Penlington J.'s finding that the profit from the plaintiff's business, as distinct from the turnover, was B$4,000 a month was surprisingly adverse to him. His pleaded case was that his profit was B$1,800 a month, and his oral evidence, though admittedly somewhat confused, certainly did not, if taken at its face value, support any higher figure.

On the basis of these findings of fact Penlington J. calculated the plaintiff's loss of earnings

separately over five periods, and arrived at a total loss of B$327,000. It is to be observed that he approached his task throughout on the basis that the currency in which the plaintiff's salary was paid, and the profits of his business made, was Brunei dollars.

Turning to future loss of earnings Penlington J. made the following further findings with regard to the probable future of the plaintiff if he had not been injured in the accident:

(1) That he would in due course have become a first class diver and then a superintendent.

(2) That his earnings from the date of trial, when he was aged 27, until his probable retirement at the age of 60 would have been B$27,000 a month.

(3) That, allowing for profits of B$6,000 a month from his new business, his future loss of earnings was B$6,000 a month or B$72,000 a year. Their Lordships would pause again here to observe that it is not apparent what was the evidential basis for the figure of B$6,000 a month deducted by Penlington J. from the plaintiff's hypothetical earnings of B$12,000 a month. Indeed, having regard to the absence of any real evidence on the matter, Penlington J. could do no more then make a reasonable estimate of the right figure, and their Lordships must assume that this is what he did.

With regard to the multiplier to be applied to the annual loss of B$72,000 Penlington J. said:—

"The plaintiff is now 27 years of age and would normally have retired at 60. He was, however, engaged in a hazardous occupation, and that is a factor which must be considered. The Chief Justice in *McGuinness* (another case in the High Court of the State of Brunei) applied a multiplier of 12 for a man of 34 who was a driller, also a hazardous occupation, who would retire at 55. I think I should apply a multiplier of 13 here. That gives a figure for loss of earnings of B$72,000 x 13 = B$936,000."

In the result the damages awarded to the plaintiff by Penlington J. were as follows:—

(1)	Agreed special damages in respect of matters other than past loss of earnings	10,292
(2)	Past loss of earnings	327,000
(3)	Pain, suffering and loss of amenities	27,500
(4)	Future loss of earnings	936,000
	Total	B$1,300,792

He further awarded interest on these sums.

The judgment of the Court of Appeal was delivered on October 18, 1982 by Sir Alan Huggins. That court, as indicated earlier, dismissed the defendant's appeal on liability and the plaintiff's cross-appeal on damages; but allowed in part the defendant's appeal on damages by reducing substantially the amount awarded for past loss of earnings. The reductions so made was from B$327,000 to B$233,688.58, with consequential variations in the amount of interest awarded in respect of that item.

The difficulties facing the Court of Appeal on the question of damages for both past and future loss of earnings were stated succinctly by Sir Alan Huggins:—

"In relation to the earnings one must first inquire what the plaintiff was earning at the date of the accident, and at once we run into difficulty because the whole case was tried on the false basis that the plaintiff was being paid in Brunei dollars, whereas the fact is that his basic salary and deep sea diving bonus was paid in lire in Italy."

Shortly afterwards he said:—

"Another difficulty which has bedevilled us, as it must the trial judge, is the unsatisfactory nature of the rest of the evidence as to damages."

Later again he said:—

"The evidence as to the earnings of his (the plaintiff's) business is woefully inadequate ..."

Sir Alan Huggins reviewed the whole of the evidence, and, using the exchange rate of B$1 = L280 prevailing at the date of the accident, made a revised analysis of the plaintiff's past loss of earnings, which he expressed in the form of a table as follows:—

Period	*Lire*	*B$*
1.10.77 to 31.12.77	785,806.44	–
1. 1.78 to 31. 7.78	1,960,000.00	–
1. 8.78 to 31. 8.78	–	4,000.00
1. 9.78 to 31.12.78	4,480,000.00	–
1. 1.79 to 30. 6.79	1,680,000.00	21,000.00
1. 7.79 to 31. 7.79	280,000.00	3,500.00
1. 8.79 to 30. 9.79	–	8,000.00
1.10.79 to 31. 1.80	4,480,000.00	–
1. 2.80 to 31. 7.80	1,680,000.00	–
1. 8.80 to 6.12.81	18,136,774.09	–
Total	33,482,580.53	36,500.00

In arriving at the plaintiff's income after he began his own business as a seller of solar energy panels, Sir Alan Huggins, while reasonably doubting the profit figure of B$4,000 a month on the grounds to which their Lordships referred earlier,

concluded that, having regard to the unsatisfactory nature of the plaintiff's evidence on the subject, the trial judge was entitled to use it as a basis for his calculations.

Turning to the question what the plaintiff would have earned but for the accident, Sir Alan Huggins accepted broadly the findings of Penlington J. as the future course which the plaintiff's career would have taken, and made a revised analysis of his hypothetical earnings expressed in the form of a second table as follows:–

Year	*Lire*	*B$*
1977	3,929,032.90	8,419.35
1978	21,840,000.00	72,000.00
1979	21,840,000.00	72,000.00
1980	21,840,000.00	–
1981 (to 6th Dec)	25,273,548.19	–
Totals	94,722,580.39	152,419.35

Sir Alan Huggins then subtracted the totals in the first table from those in the second table, thereby arriving at total losses of L61,239,999.86 and B$115,919.35 respectively. Then, applying the rate of exchange prevailing at the trial, as given in evidence, namely, B$1 = L520, he calculated the sum of the two losses as B$233,688.58, which was less by B$93,311.42 than what Penlington J. had awarded under this head.

With regard to future loss of earnings Sir Alan Huggins examined a number of criticisms made by both sides of both the multiplicand and the multiplier used by Penlington J. but rejected them all on the ground that there was evidence to support the figure of B$72,000 as the multiplicand, and that the multiplier of 13, although on the low side, was not in all the circumstances of the case so low that the Court of Appeal would be justified in increasing it.

Their Lordships now come to the appeal and cross-appeal which is before them. With regard to these, three preliminary points need to be made. The first point is that all the issues raised on both sides are issues of fact involving no question or principle of law at all. The second point is that the issues of fact raised on both sides are issues relating to the assessment of damages for past and future losses of earnings, in respect of which a court cannot, even if it has the benefit of perfect pleadings, all essential discovery, and evidence both oral and written as complete and satisfactory as it is possible to have, arrive at precise answers, because of the many hypothetical facts necessarily involved in any such assessment. The third point is that, as their Lordships indicated earlier, the want of care, thoroughness and foresight with which the advocates prepared their respective cases for, and conducted them at, the trial at first instance had the result that the trial judge had before him inadequate pleadings and only a small part of the total evidential material, especially documentary evidence, which he needed in order to make a satisfactory assessment of the two items of damages with which this Board is now concerned.

Their Lordships consider first the amount awarded for past loss of earnings. For the defendant (appellant and respondent to the cross-appeal) three main submissions were made. The first submission was that the rate of exchange of B$1 = L520, on the basis of which Sir Alan Huggins had converted back the plaintiff's loss in lire into Brunei dollars, was erroneous, and that fresh evidence, which counsel for the defendant applied for leave to adduce, would show that the correct figure was L580. The second submission was that the evidence called by the plaintiff in respect of his actual past earnings as a diver, and the earnings which he would have earned but for the accident, was incomplete and unsatisfactory; there should have been written evidence on these matters from the plaintiff's employers; and, since the burden of proof in respect of both matters lay on the plaintiff, the losses found by the Court of Appeal were not justified. The third submission was that the evidence about the profit made by the plaintiff in his new business of selling solar energy panels was wholly inadequate, and that a higher profit than B$4,000 a month should have been attributed to him in respect of it.

For the plaintiff (respondent to the appeal and cross-appellant) two main submissions were made. The first submission was that Sir Alan Huggins, in converting back the plaintiff's past earnings from Italian lire into Brunei dollars, had throughout used the rate of exchange of B$1 – L280, which was the rate in force at the date of the accident, and that he should instead have applied to the various periods the progressively changing rate of exchange which culminated in the rate of B$1 = L520 by the date of the trial. The second submission was that both Penlington J. and the Court of Appeal were wrong to attribute to the plaintiff, as the profit made by him in his new business of selling solar energy panels, a sum as high as B$4,000 a month. On the plaintiff's evidence this

was the figure for turnover and not for profit; there were deductions to be made for the cost of materials and advertising; and a much lower figure for profit should therefore have been found.

Their Lordships consider first the three submissions made for the defendant. With regard to the first submission, it depended on the grant of leave to adduce fresh evidence with regard to the rate of exchange between Brunei dollars and Italian lire prevailing at the date of the trial. Their Lordships refused such leave on the ground that the fresh evidence could, by the exercise of due diligence on the part of the defendant's advocates, have been adduced at the trial. It is also pertinent to observe, firstly, that the evidence that L520 was the correct figure was given by the plaintiff's witness, Vittorio Majoni, at the trial, and he was not cross-examined with regard to it; and, secondly, that the defendant made no application to the Court of Appeal for leave to adduce the fresh evidence concerned.

With regard to the second submission, their Lordships have already commented on the unsatisfactory manner in which both sides prepared for and conducted the trial at first instance. If the advocates for the defendant had insisted on further and better particulars of the relevant averments in the statement of claim, and on proper discovery of the plaintiff's documents, they might well have put themselves in a position to mount an effective attack on the figures given by the plaintiff, Vittorio Majoni and Colin Wilson. Having failed, however, to do either of those things, they were not able to mount any such attack, and, as a result, the figures given by these three witnesses went largely unchallenged. The trial judge expressly stated that he regarded the plaintiff and Vittorio Majoni as good and reliable witnesses, and their Lordships cannot in these circumstances see anything wrong in either the trial judge or the Court of Appeal accepting and acting on the figures spoken to by these witnesses.

With regard to the third submission, there is no doubt that the plaintiff's evidence about the profit made by him in his new business was, as Sir Alan Huggins said, woefully inadequate. It was, however, never put to the plaintiff in cross-examination that the profit exceeded B$4,000 a month, and, as their Lordships have already observed at an earlier stage, the findings that the profit was even as high as this was, on the plaintiff's evidence, surprisingly adverse to him. That being so, their Lordships can see no reason for holding that the profit made by the plaintiff should have been found to be even higher. Here again, if there had been proper discovery of the plaintiff's documents, the evidential situation might well have been different.

In the result their Lordships reject all the three main submissions made by the defendant, and turn to the two submissions made in a contrary sense for the plaintiff.

With regard to the first submission, there is logical force in the contention that, for each period of loss of earnings calculated, the amounts in Brunei dollars should have been converted to Italian lire at the contemporaneous rate of exchange, rather than all being calculated at the rate of exchange prevailing at the date of the accident. Because of the way in which the trial was prepared and conducted, however, the Court of Appeal had no evidence which would have enabled it to follow this theoretically more correct approach. This was as much the plaintiff's fault as the defendant's in not preparing and conducting the case adequately, and in these circumstances their Lordships do not consider that the plaintiff has any legitimate complaint against the Court of Appeal on this score.

With regard to the second submission, it will be apparent from what their Lordships have already said that they have some sympathy with the plaintiff on this issue. It was, however, for the plaintiff to satisfy the trial judge what was the profit made by him in his new business. Having regard to the woeful inadequacy of the evidence adduced by him on this topic, including the failure to produce any accounts or other relevant documents, their Lordships agree with the Court of Appeal that Penlington J. was justified in interpreting the plaintiff's evidence on this topic adversely to him.

In the result their Lordships reject each of the two main submissions made for the plaintiff.

It remains for their Lordships to examine the question of future loss of earnings. This involves a consideration, firstly, of the multiplicand, and, secondly, of the multiplier adopted by Penlington J. and accepted by the Court of Appeal. The multiplicand was attacked for the defendant as being too high, on the ground that a larger profit than B$6,000 a month should have been found as

likely to be earned by the plaintiff in his new business as it developed in the future. The multiplier was attacked by both sides: by the plaintiff on the ground that it was too low; and by the respondent on the ground that it was too high, although counsel did not in the end press his argument to this effect.

So far as the multiplicand is concerned their Lordships have already observed at an earlier stage that the evidence before the trial judge was so inadequate that he had no alternative but to make what amounted to no more than a reasonable estimate. Like the Court of Appeal, their Lordships do not consider that the estimate which he made was an unfair or unreasonable one for him to make. Here again the absence of discovery of the plaintiff's documents, and the failure to deal with the matter properly either in the plaintiff's evidence-in-chief or in his cross-examination, rendered the task of the trial judge, and that of the Court of Appeal, an extremely difficult one.

So far as the multiplier is concerned the main submission made for the defendant was that Penlington J. was wrong to calculate the multiplier by reference to an assumed rate of interest on the notional income from the lump sum awarded of as much as 6%: the rate which should have been taken was 4% to 5%, which would have produced a higher multiplier and resulted in a substantial increase in the sum awarded for future loss of earnings.

Their Lordships think it right to emphasise that, even when a court has the best possible evidence (which was far from being the case here), the selection of an appropriate multiplier can never be a matter of precision. A number of factors have to be taken into account, and their Lordships agree with the Court of Appeal that, although a multiplier of 13 was on the low side, it was not in all the circumstances of the case so low as to justify its being increased by an appellate tribunal.

In the result their Lordships are of the opinion that, despite the contentions advanced on either side, the figure of B$936,000 as damages for future loss of earnings has not been shown to be wrong and should stand.

There is a further point to be made with regard to this second issue relating to future loss of earnings. The question what is a proper amount to award is, as their Lordships said earlier, one of fact involving no question or principle of law. There are concurrent findings of fact on this issue by both the trial judge and the Court of Appeal, and it is not the practice of this Board, save in exceptional circumstances, to interfere with such findings. There are, in their Lordships' opinion, no such exceptional circumstances in the present case.

For the reasons given by their Lordships, they will humbly advise Her Majesty that both the appeal and the cross-appeal should be dismissed, with no order as to costs.

Appeal and Cross-Appeal dismissed.

Solicitors: *Lee Brasseur & Bury; Philip Conway Thomas & Co.*

HAJJAH TAMPOI BINTE HAJI MATUSIN & ORS. v. HAJI MATUSIN BIN PENGARAH RAHMAN

[P.C. (Lord Fraser of Tullybelton, Lord Roskill, Lord Bridge of Harwich, Lord Brightman and Sir Robin Cooke) June 27 & 28; July 31, 1984]

[Privy Council Appeal No. 51 of 1983]

Land Law – Claim of adverse possession – Limitation – Application of Limitation Enactment to registered land – Limitation Enactment 1962, ss. 13, 26 & Schedule – Land Code, Brunei, ss. 9, 27, 28 & 29

English Law – Application in Brunei – Real property and limitation – Limitation Enactment 1962 – Land Code – Application of Laws Enactment, 1951, s. 2.

In this case the plaintiffs, members of the family of the deceased co-owner of a parcel of land commenced an action against the defendant, the son of the other deceased co-owner, claiming an account of rentals, an order for the demolition of buildings and damages. The main issue was whether the action was barred by the Limitation Act 1962. The trial judge held that it was not barred as he was not satisfied that the defendant had been in adverse possession. However, although he made an order for possession in favour of the plaintiffs, he refused to order an account, demolition or damages because of the delay and the conduct of the plaintiffs. Both sides appealed to the Court of Appeal (see [1983] 2 M.L.J. 416). The Court of Appeal held that adverse possession had been admitted in the pleadings and there had been no issue arising at the trial on that score. They decided that the effect of the Limitation Enactment, 1962, was to extinguish the titles of the plaintiffs. The defendant's appeal was allowed and relief was granted on the counterclaim by declarations and orders made under the Land